Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

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IN THE UNITED STATES SUPREME COURT

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October Term, 1989

No. 89-1137

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LYNN RANNELS,

Petitioner

v.

MERIDIAN BANCORP, INC.,

Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Daniel B. Huyett, Esquire
G. Thompson Bell, III, Esquire

Attorneys for Respondent,
Meridian Bancorp, Inc.

STEVENS & LEE
607 Washington Street
P.O. Box 679
Reading, PA 19603-0679

43pp

## COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITION FOR WRIT OF CERTIORARI ESTABLISHES SPECIAL AND IMPORTANT REASONS THAT JUSTIFY THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION WHERE:

A. THE PETITIONER HAS ALLEGED A FOURTEENTH AMENDMENT VIOLATION WITHOUT PROFFERING ANY AUTHORITY TO SUPPORT THE CONCLUSION THAT THE CHALLENGED ACTIVITY BY A WHOLLY PRIVATE ENTITY IS STATE ACTION;

B. THE CHALLENGED ACTIVITY BEARS A RATIONAL RELATIONSHIP TO THE WELL-ESTABLISHED, LEGITIMATE STATE INTEREST OF AIDING OLDER CITIZENS; AND

C. PETITIONER'S DUE PROCESS CLAIM WAS NOT RAISED BELOW, IS FACTUALLY INACCURATE, AND NOT COGNIZABLE UNDER APPLICABLE LAW?

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW | |
| TABLE OF AUTHORITIES | (i) |
| CITATION TO THE OPINIONS AND JUDGMENTS BELOW | 1 |
| COUNTER-STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 5 |
| A. The Lower Courts' Decisions that Club 50 Is (1) Not State Action Within the Fourteenth Amendment and (2) Rationally Related to the Achievement of a Legitimate State Objective are Entirely Consistent with Precedent of this Court and the Courts of all Circuits. | 5 |
| B. Petitioner Has Not Been Denied Due Process. | 21 |
| CONCLUSION | 24 |
| APPENDIX | |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Acevedo v. Nassau County, New York, 500 F.2d 1078 (2d Cir. 1974) ... | 18 |
| Berbick v. Provident National Bank, No. 89-0304, slip op. (E.D. Pa. April 14, 1989) ..... | 11 |
| Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 338, 91 S.Ct. 1999 (1971) ..... | 9 |
| Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777 (1982) ..... | 7, 8 |
| Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961) ..... | 7 |
| Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1969) ..... | 20 |
| Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S. Ct. 1146 (1981) ..... | 22 |

Doran v. Cullterton,
51 Ill. 2d 553, 283 N.E.2d
865 (1972) ..... 19

Fletcher v. Rhode Island Hospital
Trust National Bank,
496 F.2d 927 (1st Cir. 1974) ... 10

Gillead v. Fordham Hill Owners'
Corp.,
601 F. Supp. 530 (S.D.N.Y.
1985) ..... 18

Jackson v. Metropolitan Edison
Company,
419 U.S. 345, 95 S.Ct. 449
(1974) ..... 6, 8,
9

Jefferson v. Hackney,
406 U.S. 535, 92 S.Ct. 1724
(1972) ..... 18, 20

Lindsley v. Natural Carbonic Gas Co.,
220 U.S. at 78-79, 31 S.Ct. at
340 ..... 15

Lugar v. Edmondson Oil Co., Inc.,
457 U.S. 922, 102 S.Ct.
2744 (1982) ..... 11

Madden v. Commonwealth of Kentucky,
309 U.S. 83, 60 S.Ct. 406 (1940) 15

Massachusetts Board of Retirement v.
Murgia,
427 U.S. 307, 96 S.Ct. 2562
(1976) ..... 14

Mathews v. de Castro,
429 U.S. 181, 97 S.Ct. 431
(1976) ..... 17

McGowan v. State of Maryland,
366 U.S. 420, 81 S.Ct. 1101
(1961) ..... 15

Moose Lodge No. 107 v. Irvis,
407 U.S. 163, 92 S.Ct. 1965
(1972) ..... 8

Morast v. Lance,
807 F.2d 926 (11th Cir. 1987) .. 9

National Labor Relations Board v.
Jones & Laughlin Steel Corporation,
301 U.S. 1, 57 S.Ct. 615 (1937) 16

Oller v. Bank of America,
342 F. Supp. 21 (N.D. Cal.
1972) ..... 11

Opinion of the Justices,
115 N.H. 228, 338 A.2d 553
(N.H. 1975) ..... 19

Rannels v. Meridian Bancorp, Inc.,
718 F. Supp. 10 (E.D. Pa.
1989) ..... 1

Rashid v. Public Savings
Association, Inc.,
97 B.R. 187 (E.D. Pa. 1989) .... 11

Rauscher Pierce Refsnes v.
F.D.I.C.,
789 F.2d 313 (5th Cir. 1986) ... 12

Rendell-Baker v. Kohn,
457 U.S. 830, 102 S.Ct. 2764
(1982) ..... 7, 9, 14

Shelley v. Kraemer,
334 U.S. 1, 68 S.Ct. 836
(1948) ..... 6

State ex rel. Harvey v. Morgan,
30 Wis. 2d 1, 139 N.W. 2d 585
(1966) ..... 19

Vance v. Bradley,
440 U.S. 93, 99 S.Ct. 939
(1979) ..... 15

Williamson v. Lee Optical of Oklahoma,
348 U.S. 483, 75 S.Ct.
461 (1955) ..... 20

U.S. Constitution

Fourteenth Amendment ..... 2, 5, 6, 7, 8, 9, 10, 14 15, 16 18

Federal Statutes

42 U.S.C. §301-306 ..... 17
42 U.S.C. §§1983-1985 ..... 11

**Federal Rules of Civil Procedure**

F.R.C.P. 12(a) ..... 12

**Federal Regulations**

I.R.C. §63(f) (1986) ..... 16
I.R.C. §121 (1986) ..... 16

**Pennsylvania Statutes**

Pa. Stat. Ann. tit. 72
§§3761-12-12.1 ..... 16

**Third Circuit Rules**

Third Circuit Rule 12(6) ..... 3

## CITATION TO THE OPINIONS AND JUDGMENTS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 718 F. Supp. 10 (E.D.Pa. 1989). The judgment of the United States Court of Appeals for the Third Circuit has not been reported.

## COUNTER-STATEMENT OF THE CASE

This petition arises from a judgment order of the United States Court of Appeals for the Third Circuit which affirmed an order of the United States District Court for the Eastern District of Pennsylvania granting respondent Meridian Bancorp, Inc.'s ("Meridian") motion for summary judgment and dismissing petitioner Lynn Rannels' ("Rannels") lawsuit. In his pro se complaint filed with the district court, Rannels alleged that Meridian's Club 50 program unconstitutionally discriminates against persons under the age of 50 because it offers membership only to persons over 50 years old and therefore violates the Equal Protection Clause of the Fourteenth Amendment. Club 50 is a banking service offered to the public that, like innumerable other programs sponsored by private and public entities, offers certain benefits to older customers.

In its opinion, the district court cites two primary reasons for its decision. First, it determined that Meridian is not a state actor and the Club 50 program is not state action susceptible to restriction by the Fourteenth Amendment. Rather, as a private company, Meridian is perfectly within its rights to institute a banking program, such as Club 50, that helps those over the age of 50. Second, even if Meridian's program is somehow characterized as state action, there

exists a rational relationship between its Club 50 program and a legitimate state objective.

In summarizing its opinion, the district court wrote: "Plaintiff's claims are so devoid of merit that they border on the legally frivolous and tread dangerously close to justifying Rule 11 sanctions." [District Court Opinion at 7].

On August 23, 1989, Rannels filed an appeal to the court of appeals. After the submission of briefs by both parties, the court of appeals notified the parties that oral argument would be dispensed with under Third Circuit Rule 12(6) which provides that oral argument will not be held if the panel is unanimously of the opinion that oral argument is unnecessary. By judgment order of December 21, 1989, the court of appeals affirmed the judgment of the district court without opinion and taxed costs against Rannels. On January 11, 1990, Meridian received Rannels' petition to this Court for writ of certiorari.

## SUMMARY OF ARGUMENT

There are no special and important reasons for granting Rannels' petition for writ of certiorari. The holding by the district court that Club 50 is not state action, and the appellate court's affirmance of this decision, is entirely consistent with relevant precedent of this Court and the courts in every circuit. There is no precedent cited in the petition for writ of certiorari that is at odds with the lower courts' decisions. Moreover, the district court's holding that Club 50 is rationally related to a legitimate state objective comports with the decisions of this Court and the courts in all circuits.

Petitioner was not denied due process before either the district or the circuit court. Petitioner failed to raise his claim of a denial of due process before either of the lower courts; therefore, this Court should refuse to consider this issue on appeal. Even if this issue is considered, it must be rejected because it is based on petitioner's factually incorrect contention that neither respondent nor the lower courts mentioned "the challenged banking activity" during the course of the proceedings. Moreover, petitioner has not cited any legal authority, nor is respondent aware of any authority, to support petitioner's unique contentions.

## ARGUMENT

**PETITIONER HAS FAILED TO ESTABLISH ANY SPECIAL AND IMPORTANT REASONS THAT JUSTIFY THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.**

### A. The Lower Courts' Decisions that Club 50 Is (1) Not State Action Within the Fourteenth Amendment and (2) Rationally Related to the Achievement of a Legitimate State Objective are Entirely Consistent with Precedent of this Court and the Courts of all Circuits.

There are two fundamental Fourteenth Amendment concepts that pertain to an analysis of Meridian's conduct: (1) the Fourteenth Amendment's state action requirement and (2) the level of scrutiny that is applied to state action that allegedly violates the Fourteenth Amendment. As discussed below, the lower courts correctly determined that both of these concepts compel the dismissal of Rannels' lawsuit.

#### 1. The District and Circuit Courts Correctly Determined that Rannels has not met the Fourteenth Amendment's Threshold Requirement of State Action.

The first section of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. (Emphasis added).

Hence, by its plain language, the Fourteenth Amendment circumscribes only action taken by a "State." The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842 (1948).

While no uniform test for ascertaining state action has emerged, this Court's decisions clearly establish that the instances in which conduct by a private party, such as Meridian, will be deemed as state action for the purposes of the Fourteenth Amendment are rare. It is not enough for the private party to be heavily regulated by the state. Jackson v. Metropolitan Edison Company, 419 U.S. 345, 350, 95 S.Ct. 449, 453 (1974) (electric utility's acts are not state action, even though it enjoys a state-granted monopoly and is subject to

extensive state protection and regulation). It is not enough for the private party to be financed by public funds. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764 (1982) (a privately-owned school which received at least 90% of its operating budget from public funds was not a state actor). It is not enough for the state to have acquiesced in the private party's actions. Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777 (1982) (a private nursing home's decision to transfer certain patients to an inferior type of nursing home was not state action, despite the affirmation of the transfers by state and local officials). It is not even enough for the private party to have acted to comply with state regulations. Blum, 457 U.S. at 995-996, 102 S.Ct. at 2781.

When private conduct is constitutionally challenged, the Fourteenth Amendment's state action requirement can be met only when state involvement into private activity is so extensive that the action is tantamount to action of the state itself. Blum, 457 U.S. at 1004, 102 S.Ct. at 2786. Only three types of situations have met this requirement.

The first is where there is a symbiotic relationship between the state and the private entity. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961) (a restaurant that refused service because of a customer's race violated the Fourteenth Amendment where the restaurant was located

in a building owned by a state-created parking authority and the profits earned by the restaurant's discrimination were an indispensable element in the parking authority's finances). There is no symbiotic relationship where the state merely authorizes and regulates a private enterprise. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972) (the granting of a state liquor license which requires the licensee to, among other things, make physical alterations to its premises and keep extensive financial records is nothing approaching the symbiotic relationship necessary to establish state action under the Fourteenth Amendment).

The second type of situation where state action has been recognized is where there is an extremely close nexus between the state and the specific action that is being challenged. See Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S.Ct. 449 (1974) (state action may be established if the nexus between the state and the challenged activity is so close that the latter may be fairly treated as that of the state itself). To meet this requirement, a complainant must show that the state was so involved with the challenged activity that the state was actually responsible for the specific conduct at issue. Blum, 457 U.S. at 1004, 102 S.Ct. at 2786.

The third type of situation that may involve state action is where the private entity exercises powers that are "traditionally the exclusive prerogative

of the State." Jackson, 419 U.S. at 353, 95 S.Ct. at 454. To meet this requirement, it is not enough that the private entity perform functions that sometimes are performed by the state; rather, the exercised power must be the state's exclusive prerogative. See Rendell-Baker, 457 U.S. at 842, 102 S.Ct. at 2772 (a private entity that provides education for young people, while it performs a public function, does not perform a function that is traditionally the exclusive prerogative of the state and its actions are not state action under the Fourteenth Amendment).

As the lower courts determined, Meridian's Club 50 does not even begin to approach satisfying any of these standards for state action.

The lower courts' decisions to dismiss Rannels' complaint for lack of state action is consistent with decisions by other courts which have uniformly held that conduct by banks is not state action for Fourteenth Amendment purposes. In Morast v. Lance, 807 F.2d 926 (11th Cir. 1987), the court granted defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted because the defendant bank was not a party that acted under color of federal law. There the plaintiff alleged a cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 338, 91 S.Ct. 1999 (1971), arising from the involuntary termination of his employment with the bank after he had reported an

irregular transaction involving the bank's chairman and his son. Plaintiff's reporting of the irregular transaction was required by the National Banking Act.

After noting that the concept of action under color of federal law for purposes of a Bivens action is virtually identical to the concept of action under color of state law for purposes of a §1983 action, the court held that the bank was not acting under color of federal law. The court made several significant points. First, according to the court, although the bank was chartered by the government, it did not act jointly with the government and was not so interrelated with the government that they could be considered one entity. Second, the court said that banking is not a function that traditionally has been "exclusively reserved" for the state. Third, there was not a sufficiently close nexus between the government and the challenged activity to treat the bank's action as an action of the government. The court emphasized that the government had played no part in the bank's decision to fire the plaintiff. 807 F.2d at 931.

Similarly, in Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927 (1st Cir. 1974), the court granted a motion to dismiss for a failure to state a claim where the plaintiffs alleged that the defendant bank had denied their Fourteenth Amendment due process rights when it set off amounts due under a bank credit card against funds in the plaintiffs' checking account. Plaintiffs

claimed the existence of state action because the State of Rhode Island sanctioned the set off practice and the state generally was highly involved in the banking industry. Id. at 929. However, the court held that neither Rhode Island's acceptance of the set off system nor its close regulation of banks was sufficient to render the set off procedure state action. See also Berbick v. Provident National Bank, No. 89-0304, slip op. (E.D. Pa. April 14, 1989) (claim under 42 U.S.C. §§1983 and 1985 arising from bank's repossession of automobile dismissed as frivolous because of lack of state action); Rashid v. Public Savings Association, Inc., 97 B.R. 187 (E.D. Pa. 1989) (claim against bank under 42 U.S.C. §1985 dismissed because plaintiff failed to produce evidence from which a fact-finder could reasonably conclude that there was state involvement); and Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972) (motion to dismiss complaint against a bank alleging a §1983 violation granted because bank's conduct was not state action).

Except in situations where a bank acted in actual concert with the state to deprive a citizen of property without due process, see Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S.Ct. 2744 (1982), Meridian has not found any court decision in which a bank's conduct has been deemed to be state action. Morast, Fletcher, Berbick, Rashid and Oller are the cases most analogous to Club 50. In each of

those cases, as in this case, the court granted the defendant bank's motion to dismiss for lack of state action.

Rannels does not cite any contrary authority.1 He merely argues that Club 50 is state action because Meridian, like most other banks, is a member of the federal reserve system and some of its deposits are FDIC insured to certain levels. This argument flies in the face of the general principles of state action established by this Court and the above-cited decisions wherein banks have been deemed strictly private entities.

The total absence of state action in the instant case is also apparent when the three indicia of state action discussed in Blum are applied. First, the state is not responsible for Club 50 in any way. Club 50 is a purely private program that is operated for purely private reasons. [District Court Opinion at 7]. No government entity played any role

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1 The only court decision cited in the petition for writ of certiorari is Rauscher Pierce Refsnes v. F.D.I.C., 789 F.2d 313 (5th Cir. 1986). This decision lends absolutely no support to Rannel's assertion of state action. The Rausher court held that FDIC is an agency of the United States for the purpose of Fed. Rule of Civ. Pro. 12(a). The decision does not relate even remotely to the question of whether FDIC insurance is sufficient to turn otherwise private conduct into state action.

whatsoever in establishing Club 50, and Club 50 was not created in response to any governmental regulations. [Id.]. Moreover, although the financial components of Club 50 are subject to normal federal and state banking regulations, there are no special regulations that affect Club 50. [Id.].

Second, the state has not exercised any coercive power or provided any encouragement to Meridian for Club 50. It is undisputed that Meridian is a strictly private entity whose purpose is to provide quality financial services, while providing its shareholders a reasonable return on their investment. Meridian does not gain or preserve any governmental funds as a result of Club 50, and Club 50 is not required by any governmental regulations.

Third, as held in Morast, banking is not traditionally the exclusive prerogative of the state.

For these reasons, it is clear that Meridian's Club 50 is not state action and that Meridian is not a state actor. Even construing the indicia of state action liberally, there are no facts that even approach the level of state involvement needed to establish state action. Moreover, all of the courts that have faced the issue of whether conduct by a bank is state action have readily concluded that state action is not present. In short, there is not a shred of support, either factual or in case law, for the notion that Club 50 is conducted

by the state. In the words of the district court, petitioner's claims are "devoid of merit" and "legally frivolous." [District Court Opinion at 7].

2. Even Assuming, Arguendo, that State Action has been Established, the Lower Courts Correctly Concluded that Club 50 is Rationally Related to a Legitimate State Interest.

(a) The Rational Relationship Test

Although it is clear that Club 50 does not constitute state action and that the inquiry should end there, see Rendell-Baker, 457 U.S. at 838, 102 S.Ct. at 2770, even if state action is assumed, the lower courts correctly dismissed Rannels' complaint because Club 50 is rationally related to a legitimate state interest.2

While this Court has been urged to adopt a sliding scale of scrutiny without any rigid tiers, see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 317-327, 96 S.Ct. 2562, 2569-2574 (1976) (Marshall, J., dissenting), the Court has

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2Because these principles apply to state action, it is anomalous to even attempt to apply them to Meridian's private Club 50. However, ignoring this anomaly, these precepts underscore the fact that Rannels has not stated a claim under the Fourteenth Amendment.

adopted and steadfastly applied a strict three-tiered system. Depending upon the nature of the challenged classification and the rights involved, the Court applies either "strict scrutiny," the "rational basis with a bite" test, or the "rational relationship test."

In Murgia, supra, the Court held that the "rational relationship test" is to be applied to classifications based on age. Under this test, which is the easiest to satisfy of the three, the challenged conduct does not violate the Fourteenth Amendment if any set of facts may be conceived to show that the conduct bears a rational relationship to the achievement of a legitimate state interest. McGowan v. State of Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105 (1961). When the rational relationship test is applied, the Fourteenth Amendment is violated only after the plaintiff negates every conceivable basis that might support the challenged conduct. Madden v. Commonwealth of Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408 (1940).

Moreover, the alleged state actor does not have the burden to produce empirical proof of the factual assumptions on which the classification is based. Rather, the burden is on those challenging the classification to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the decision maker." Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 949 (1979), citing, Lindsley v. Natural

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age assistance grants to the states to supplement welfare and Social Security benefits that are provided to elderly citizens. 42 U.S.C. §§301-306. And, of course, one of the primary purposes of the federal Social Security system is to provide a basic level of income to older citizens. See Mathews v. de Castro, 429 U.S. 181, 97 S.Ct. 431 (1976). There is absolutely no doubt that providing benefits to older citizens is a well-recognized and legitimate state objective.

Meridian's Club 50 is a rational way of helping to achieve the state objective of helping older citizens. By providing older citizens with certain financial and non-financial services that they may otherwise be unable to afford, Club 50 allows older citizens to enhance the quality of their lives and conserve their economic resources.

Although there does not appear to be any decisions that have dealt with the many private programs that benefit senior citizens, there are numerous cases where courts have considered the constitutionality of government programs that favor senior citizens. In every one of these cases, the courts have found that the governmental plan was a rational means of achieving the legitimate state interest of providing for older citizens. Some examples include:

| Case | Holding |
| --- | --- |
| Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724 (1972) | State system for allocating welfare money which provided a higher proportion of the available funds to aged, blind or disabled persons than to black or Mexican-American persons was not invidious or irrational, and did not violate the Equal Protection Clause of the Fourteenth Amendment. |
| Acevedo v. Nassau County, New York, 500 F.2d 1078 (2d Cir. 1974) | Abandoning a plan for housing for low income families, which would be occupied predominately by minority persons, while continuing a plan for low income housing for senior citizens, which would be occupied predominately by white persons, did not deny equal protection. |
| Gillead v. Fordham Hill Owners' Corp., 601 F. Supp. 530, (S.D.N.Y. 1985) | Motion to dismiss granted where plaintiff claimed an equal protection violation after being evicted from his apartment to make room for a senior citizen housing project.<br><br>"It is well settled that a benefit can be extended to a class such as senior |

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| | citizens, consistent with the mandates of the Due Process and Equal Protection Clauses, as long as the benefit is rationally related to the achievement of a legitimate state objective." (emphasis added). |
| Opinion of the Justices, 115 N.H. 228, 338 A.2d 553 (N.H. 1975) | Larger tax exemptions for older citizens are reasonable "upon their face" and do not violate constitutional provisions concerning uniformity and equality of taxation. |
| Doran v. Cullterton, 51 Ill. 2d 553, 283 N.E.2d 865 (1972) | Property tax exemption for older citizens was a rational basis for helping to provide for older citizens and was not invidious discrimination in violation of the Equal Protection Clause. |
| State ex rel. Harvey v. Morgan, 30 Wis. 2d 1, 139 N.W. 2d 585 (1966) | Statute providing income tax credits and refunds to persons over 65 years of age does not deny equal protection of the laws. |

Given the clear public policy in favor of providing benefits to older citizens and the unanimity among the courts in approving any state action that provides benefits to older citizens, any classification, such as that in Club 50, that favors older persons over younger persons is not a violation of the Equal Protection Clause. Thus, even assuming state action, Club 50 is, in the words of the New Hampshire Supreme Court, "upon its face" not a violation of the Equal Protection Clause. Opinion of the Justices, supra.

This is consistent with the notion that the Equal Protection Clause does not protect against every classification; rather, it is designed to safeguard only against "invidious" classifications. Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162 (1969); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955). State action that favors senior citizens over younger citizens is not invidious. Jefferson, 406 U.S. at 549, 92 S.Ct. at 1733 (providing higher welfare benefits to the aged than to certain other groups is not an "invidious" classification).

All of the pertinent court decisions and legislative acts point to the extremely relaxed scrutiny applied to classifications based on age and particularly to classifications favoring older citizens. Indeed, in every classification based on age that has been considered by a court, a rational relationship has been found. Like many of

these judicially approved programs, Club 50 bears a rational relationship to the legitimate state objective of providing benefits to older citizens. Therefore, in addition to the total lack of state action, the lower courts correctly dismissed Rannels' complaint because it easily passes the rational relationship test.

B. Petitioner Has Not Been Denied Due Process.

In the petition for writ of certiorari, Rannels contends for the first time that he has been denied due process because his complaint was dismissed by the lower courts "without either court directing inquiry towards or even mentioning the challenged banking activity." [Petition for Writ of Certiorari at 5-6]. Rannels also contends that he was denied due process because counsel for respondent never mentioned the "challenged banking activity" before the district court. [Petition for Writ of Certiorari at 6]. Rannels' "due process" argument provides no basis for granting the writ of certiorari.

First, Rannels failed to preserve this issue for appeal by raising it below. The alleged denial of due process was not raised in any form before either the district or the circuit court. Most importantly, there is absolutely no mention of an alleged denial of due process in Rannels' brief to the circuit court. [See Petitioner's Circuit Court Brief attached hereto as respondent's

appendix]. Accordingly, petitioner's "due process" argument has not been preserved below and cannot be considered by this Court. Delta Air Lines, Inc. v. August, 450 U.S. 346, 363, 101 S. Ct. 1146, 1155 (1981).

Second, Rannels' allegation that the "challenged banking activity" (i.e., the Club 50 program) was not mentioned by the lower courts or counsel for Meridian is factually incorrect. While the circuit court made no direct mention of the Club 50 program because it affirmed the district court's decision without opinion, the first sentence of the district court's opinion references the program by stating: "Plaintiff has filed a pro se complaint alleging that defendant's "Club 50" program, which provides discounts on various services to those who are 50 years of age or older, unconstitutionally discriminates against those who are under age 50." [District Court Opinion at 1]. Moreover, the briefs filed by Meridian before both lower courts are replete with references and descriptions of the Club 50 program.

Third, Rannels' "due process" contention is without any legal merit. Rannels fails to cite any authority in support of his contention that the alleged failure by the lower courts and counsel for Meridian to mention Club 50 violates due process, and Meridian is unaware of any such precedent. Rannels fails even to explain the rationale for this contention. Consequently, it must be concluded that Rannels' "due process" argument is but the



latest of his spurious arguments and provides absolutely no support for his petition for writ of certiorari.

## CONCLUSION

In view of the foregoing, the Court should deny the petition for writ of certiorari. The decisions of the lower courts are entirely consistent with every relevant expression of public policy and law. Petitioner has not established any special or important reasons of the character that would justify granting the petition for certiorari; indeed, as recognized by the district court, petitioner's constitutional challenge to Club 50 is a misdirected crusade without any colorable legal support.

STEVENS & LEE

By Daniel B. Huyett

Daniel B. Huyett, Esq.
G. Thompson Bell, III, Esq.
607 Washington Street
P.O. Box 679
Reading, PA 19603
(215) 376-9781

Attorneys for Respondent,
Meridian Bancorp, Inc.

# APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

# 89-1742

RANNNELS, LYNN

Appellant

vs

MERIDIAN BANCORP, INC.

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Appeal of civil case #89-4467... summary judgement by Judge Franklin S.Van Antwerpen...United States District Court for the Eastern Distric of Pennsylvania

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BRIEF FOR APPELLANT
(appendix included)

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Council

Appellant: LYNN RANNELS, PRO SE
R.D.#2 Box 191
Reinholds, Pa. 17569

Appellee: DANIEL B. HUYETT, ESQUIRE
601 Washington Street
P.O. Box 679
Reading, Pa. 19603-0679

TABLE OF CONTENTS


| | page |
|---|---|
| SUBJECT MATTER AND APPELATE JURISDICTION | 1 |
| STATEMENT OF ISSUES | 1 |
| STATEMENT OF CASE | 1 |
| STATEMENT OF FACTS | 2 |
| STATEMENT OF RELATED CASES/PROCEEDINGS | 2 |
| STANDARD AND SCOPE OF REVIEW | 2 |
| ARGUMENT | 3 |
| CONCLUSION | 8 |
| OPINION AND ORDER | 10 |
| PROOF OF APPEAL | 18 |
| CERTIFICATE OF SERVICE | 19 |
| APPENDIX | 20 |

## SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction exists under 42 USCS within sections 1983 and 6101 concerning "equal protection" under the 14th Amendment. Appellate jurisdiction exists because the Third Circuit Court of Appeals is the appropriate court to seek reveiw and reversal of a decision made in the United States District Court for the Eastern District of Pennsylvania.

## STATEMENT OF ISSUES

1. Can a Federal Reserve Member Bank arbitrarily divide its customer base according to age and charge different rates for check clearing and collecting services?

2. Can a Federal Reserve Member Bank utilizing its membership in the Federal Deposit Insurance Corporation to attract private depositors and subsequently practice arbitrary age discrimination through paying higher or lower interest rates on these deposits in reference to an investor's age?

## STATEMENT OF CASE

The appellant, Lynn L. Rannels, invested in a certificate of deposit (appendix p.1). Later the appellant requested that he also be paid the 1/4 % higher interest that the Appellee, Meridian Bancorp, offered to investors over 50 years old (appendix p.2). The appellee refused this request, and indicated that this higher interest rate was available to Club 50 members only (appendix p.3) who also receive check clearing and collecting services at a discounted fee.

## STATEMENT OF FACTS

1. A major achievement of the Federal Reserve System has been setting up and operating an efficient nationwide mechanism for the clearing and collecting of checks.

2. The appellee as a member and component part of the Federal Reserve system arbitrarily charges its retail customers different fees for check clearing and collecting in reference to their age (appendix p.3 ).

3. Meridian Bank uses its membership in the FDIC to promote depositor confidence. "A Meridian Bank CD is one of today's safest and surest investments. Safest because the account is insured up to $100,000 by the FDIC." (appendix p. 2 par.3)

4. As a member of the FDIC, the Appellee, arbitrarily pays different interest rates to depositors in reference to age.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

The appellant can cite no related cases. Judge Van Antwerpen in his opinion and order (this brief p.10 ) cited various cases to substantiate his opinion. None of the cases cited related to "equal protection" and "fees for banking services or interest on deposits".

## STANDARD AND SCOPE OF REVIEW

The success of this appeal depends upon the existence of state action and the non-existence of state objective. Judge Van Antwerpen in civil action #89-4487 granted summary judgement in favor of Meridian Bancorp claiming that no state action existed whereas their discriminatory fee

structure and interest payments accomplished a state objective.

ARGUMENT

In Judge Van Antwerpen's opinion (this brief pp.10-16) he cited several instant cases to justify his decision. None of the cases were related to the "equal protection " clause of the 14th Amendment, nor did any approach the question of state objective from within the parameters of the challenged banking activities. The unrelated cases he used to prove that state action, did not exist (this brief p.13) are as follows:

1. BLUM V, YARETSKY concerned due process in reference to Medicare benefits and cited unrelated 42 USCS ss 1396.
2. JACKSON V. METROPOLITIAN EDISON CO. concerned due process in reference to collecting a debt.
3. RENDELL-BAKER V. KOHN concerned due process in reference to a job aciton.

In his opinion (this brief p.14) Judge Van Antwerpen focused on civil actions involving banks to prove that "the courts have uniformly held that conduct by banks is not state aciton." Here again the question of state action was not addressed from the perspective of the challenged banking activities involving age related fees for checking services and interest rates on deposits paid by a Federal Reserve Member Bank. The unrelated cases are as follows:

1. MORAST V. LANCE concerned 42 USCS section 1985 when the point in controversy is under section 1983.

2. FLETCHER V. RHODE ISLAND HOSPITAL TRUST NATIONAL BANK concerned due process in collecting a debt and was unrelated to the challenged banking acitvities.

3. OLLER V. BANK OF AMERICA involved due process concerning reposession of an automobile and again was unrelated to the challenged banking activities.

4. LUGAR V. EDMONSON OIL CO. concerned due process in the reposession of property and didn't involve a banking institution.

In his opinion (this brief p.16) Judge Van Antwerpen proposed that Meridian's Club 50 accomplished a state objective by giving preferential treatment to senior citizens (people over 50). The cases he cited here again did not address the challenged action and were not related to age discrimination:

1. JEFFERSON V. HACKENY concerned a dispute concerning the method used to calculate public assistance due individual recipients... not age discrimination.

2. ACEVEDO V. NASSUAU COUNTY, NEW YORK concerned race discrimination not age discrimination.

The challenged action of age related checking fees and interests payments by a Federal Reserve Bank was not referenced once in Judge Van Antwerpen's Opinion (this brief pp.10-16). Had he addressed this civil complaint from within the parameters of the challenged banking activities state action would have been undeniable.

The Appellee, Meridian Bank, as a member of the Federal Reserve is an agency of the government assisting in the implementation of our national monetary policy. Members of the Board of Governors of the Federal Reserve are appointed by the President with the advice and approval of the Senate. Although it is so organized to be independent of "short term" political influence, Meridian as a Federal Reserve Member Bank is in fact a Depository and Financial Agent of the Government (31CFR ss 202) who accepts deposits and collects and clears checks (in lieu of cash) for both private and public entities.

Meridian Bank's age related dual interest rates violates various conditions of its membership to the Federal Reserve. Under 12 CFR ss 217.603 "payment and computation of interest on time and savings deposits" does not allow for a depositor's age to be used when calculating an interest rate.

Because of this Meridian is also in violation of section 217.6(g) "accuracy of advertising" concerning interest on deposits". A component part of Meridian's Club 50 is in violation of 12 CFR ss 202 regulation B, "Equal Credit Opportunity". This regulation prohibits creditor practices that discriminate on the basis of factors including age. The Club 50 promotional brochure (appendix p.3) offers free MasterCard and Visa as well as preferred rates on installment loans arbitrarily unavailable to those under the age of 50.

In his opinion (this brief p. ) Judge Van Antwerpen claims benefits for "older citizen" and "senior citizens" constitute a state objective. Nowhere is there a statutory age of 50 for non-means tested government assistance or benefits. Since the challenged actions involve the Federal Reserve the appropriate difinition of "Elderly" under 12 CFR ss 202.2(o) is "age 62 or older". This age discrepancy itself disproves the existence of a state objective. In spite of this Judge Van Antwerpen defended the challenged action of paying higher interest rates to those over 50 as a state objective. This is obviously incorrect since neither United States Savings Bonds, federal, state, nor municipal bonds use age to calculate the rate of interest paid to investors.

State action and the lack of state objective can be established from a second perspective since Meridian is a member of the Federal Deposit Insurance Corporation. Being a member of the FDIC is a partnership with the United States Government which also involves conditions of membership. Being a member of the FDIC is virtually a necessity for commercial banks to attract private depositors. Here again Meridian is in violation of its membership agreement within 12 CFR ss 329, concerning age related interest payments.

The partnership between the FDIC and member banks became even more pronounced on August 9, 1989, when President Bush signed a law to reorganize the deposit insurance bureaucracy under the FDIC and Congress subsequently pumped billions of

dollars into the FDIC reserve fund to maintain the public's confidence in our nation's depository institutions.

Another avenue of Federal assistance identifying Meridian as a state actor is through government guaranteed loans through the Department of Health and Human Services. The cumulative supplement of May 1989, to 42 UCS ss 6107(3) redefined "Federal Department or Agency". Combined with the definitions of "federal financial assistance, recipient, and subrecipient" within, 45 CFR ss 91, Meridian is clearly a state actor within the expanded definition of "Federal Department or Agency," since it benefits from government subsidized loans.

Judge Van Antwerpen in his summary (this brief p.16), expressed a personal opinion contrary to state objectives when he labeled the benefits of the Club 50 program as "picayune". He further pronounced the claims in this civil action "so devoid of mer t that they border on the legally frivolous." He concentrated his attention on the "premiums on deposits" offered by the Club 50 program while ignoring the main points of controversy in this complaint. But even following his lead, these undeclared "premiums on deposits" are legally defined as taxable interest by the Federal Reserve under 12 CFR ss 217.302 and the Internal Revenue Service in ss 666.06 - 1989 Standard Federal Tax Reports. Because of this, Judge Van Antwerpen is in the unusual position of defending Meridian's "picayune" tax fraud and is at crosspurposes with the Internal Revenue Service.

The Appellee as a state actor is currently operating outside assorted legal boundaries as well state objectives. As a state bank, Meridian under 12CFR ss 208.6(b),"Shall enjoy all the privileges and observe all the requirements of the Federal Reserve Act and other acts of Congress applicable to member state banks and of the regulations of the Board made pursuant to law which are applicable to member state banks".

CONCLUSION

Had the appellant been allowed to proceed in litigation, he could have also proven that the Pennsylvania Secretary of Banking, Sarah Hargrove, has been working in concert with Meridian Bancorp supporting discriminatory pricing and interest payments (thinly disguised as custom banking services for those over 50). Since Judge Van Antwerpen has granted summary judgment in favor of Meridian, the Appellant has filed civil action 89-6155 seeking injunctive relief from the aforementioned related state involvement. This case has also been assigned to Judge Van Antwerpen.

Prior to serving in Vietnam I, the Appellant, swore an oath to defend and protect the Constitution of the United States. Judge Van Antwerpen has now declared that only when I reach the age of 50 will the Constitution guarantee me full and equal protection in return. Should this remarkable deviation from Constitutional Law prevail, those responsible bear the burden of informing today's young Americans swearing this same oath that they now defend a Constitution

that only provides them unconditional equal protection after the age of 50.

CERTIFICATE OF BAR MEMBERSHIP

Not necessary, appellant proceeding "pro se."

OPINION AND ORDER FOLLOWING ON NEXT PAGE

Lynn Rannels, APPELLANT

LYNN RANNELS
RD#2 Box 191
REINHOLDS, PA. 17569
PH 215-484-4685